justice, liberty and right," not contained in that law, and which, therefore, Judge Black says "are no proper elements of a judicial opinion upon it." Fortunately, neither the wisdom of those who framed that law, nor of those from whom it was chiefly derived, was so short-sighted. The necessary provisions are to be found in it, not implied only, but expressed, not in its spirit alone, but in its letter. Guided by these, we think it clear that the acts in question are unconstitutional, because they are a delegation of legislative power; because they authorize taxation of a part of the State for the benefit of the whole; because the money so to be raised is revenue, which can only be raised by the General Assembly, and by bills originating in the House of Representatives.

CECIL.

Philadelphia, Oct. 1853.

RECENT AMERICAN DECISIONS.

In the District Court of the United States, for the District of Wisconsin. August, Special Term, 1853.

EDWARD A. WRIGHT, ET AL. *vs.* CHARLES N. SHUMWAY, ET ALS.

IN EQUITY.

1. A mortgage given to secure a debt then due and payable may be redeemed or foreclosed at any time.

2. A covenant on the part of a settler upon unsurveyed lands of the United States to purchase those lands as soon as they are surveyed and offered for sale by the Government, and then mortgage them to a creditor for the security of a debt, is not a contract in violation of Sections 4 and 5 of an Act of Congress, entitled "An Act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the land of the United States. [4 U. S. Statutes at Large, 390.]

3. An equitable mortgage springs from an agreement that there shall be a lien. A covenant, by a debtor with his creditor, to purchase certain lands therein described, and to mortgage them to said creditor as a security for a debt, is an equitable mortgage, and will be enforced in equity by a decree of sale of the premises, in pursuance of a prayer of a bill for that purpose.

4. Where a settler on public lands, entitled to a pre-emption, procures a capitalist to pay the purchase money into the land office, and allows him to take the receiver's receipt in his own name, or makes an assignment to him of his certificates of location as his security for such payment, upon receiving back a bond for a deed upon repaying on a certain day the said purchase money with interest, and the annual taxes on the land; this is, in equity, a mortgage of the premises, redeemable by the settler or his assigns, at or before the time the said money becomes payable, according to the conditions of the bond.

The opinion of the Court was delivered by—

MILLER, J.—The defendants, Charles N. Shumway, John P. Shumway, Jabez N. Rogers and John S. Harris, in the year 1849, became indebted to these plaintiffs by several promissory notes, in the sum of twelve hundred dollars. On the fourteenth day of December, 1850, Charles N. Shumway and John P. Shumway, having settled upon and being in possession of the following described unsurveyed public lands, executed and delivered to the plaintiffs a deed or instrument under seal, by which they, for the consideration therein expressed, of one dollar, did "sell, assign and convey to the parties of the second part, all their right, title and interest in those certain pieces of land, situate in the township of Buffalo, in Marquette County, now occupied by the said Charles and John N. Shumway, and on which are now standing the saw-mill, dwellings, tavern stand and other buildings owned by the said parties of the first part, or any of them. Said land being six hundred and forty acres, and embracing the mill-site on White River, and place known as Wautoma. Together with all the water privileges, rights and easements and other appurtenances, and the buildings erected on the said land. The property hereby assigned being intended to include all the claims held by or for the said parties of the first part on the lands now occupied by them, and yet unsurveyed and not sold by the United States, at said Wautoma, to have and to hold the same to the said Edward and Augustus and their heirs forever. This grant is intended as a security for the indebtedness of the said parties of the first part to the said parties of the second part, consisting of three notes, in all about twelve hundred dollars, besides interest. And the said parties of the first part hereby covenant and agree to and with the said parties of the se-

cond part, that they will purchase the said land of the United States whenever the same shall be surveyed and exposed to sale; and will mortgage the same, with the appurtenances, to the said parties of the second part, their survivors or assigns, to secure the indebtedness aforesaid, or such part thereof as may then be unpaid, so soon as the said land shall be exposed to sale." This deed was acknowledged by the grantors before a Notary Public, and filed with the Town Clerk as a chattel mortgage; and in October, 1852, it was recorded in the office of the Register of Deeds of the proper county, as a mortgage of real estate.

On the 16th December, 1850, the defendant, Jabez N. Rogers, by his deed duly executed and acknowledged, confirmed the aforesaid deed, and conveyed to these plaintiffs his interest in these premises, for the purpose of securing this debt.

These lands were surveyed and offered for sale by the United States, in June 1852. In November, 1852, John P. Shumway proved up a pre-emption right, and entered one hundred and sixty acres, which included the village of Wautoma, and assigned the certificate of location to John Fitzgerald, in consideration of the payment by him of the purchase money at the land office, at the request of said Shumway; and on the same day Fitzgerald entered in his own name, one other quarter section of this land, for Charles N. Shumway, of which he claimed a right of pre-emption. These two quarter sections were parcels of the lands described in this deed; and they were purchased by and in the name of Fitzgerald, at the instance and request of the Shumways, he giving to each of them a bond, in the penalty of five hundred dollars, conditioned that he, the said Fitzgerald, shall make to them respectively a deed for a quarter section, as described in the bond, on paying to him two hundred dollars, with interest, within two years thereafter, and also paying the annual taxes.

After these two quarter sections were entered at the land office as aforesaid, a demand was made by the plaintiffs, of the Shumways, of a mortgage, in pursuance of the covenant in this deed, which they refused.

The Bill was taken as confessed against John S. Harris, and

also against Jabez N. Rogers, he not claiming any interest in the premises. The Shumways and Fitzgerald made defence.

It was contended, on the part of the defendants, that this deed is a contract, in violation of sections 4 and 5 of an Act of Congress, entitled "An Act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States," [4 Statutes at Large, 390,] and therefore void. I do not think that this is a contract prohibited by this Act of Congress. The plaintiffs were merchants doing business in the City of New York, and not contemplating the purchase of this land, or of any interest therein, either at a public sale by the Government, or in any other manner, but merely desiring a security for their demand, accepted this deed for the purpose. The land was not intended by the Shumways to be the subject of a public sale by the Government. At the date of the deed they had the peaceable and undisturbed possession, with the tacit or implied assent of the United States; and had erected "a saw-mill, dwellings, a tavern-stand and other buildings, and had thereby an inchoate right of pre-emption. In consideration of their indebtedness, they executed and delivered this deed as a security merely, and not as a conveyance. But even if the land was to have been purchased by the Shumways at a public sale, there is nothing in this deed to prevent competition in bidding, or to stop these plaintiffs from becoming the purchasers; but on the contrary, the covenant on the part of the Shumways to purchase the land and then to mortgage it, might have induced competition, and required them to bid it off at a much higher rate than the *minimum* price.

The defendants objected to this deed as void for want of consideration; and also, that if the debt was a consideration, it was then due and payable, and no time is mentioned for its payment, or for the purchase of the land, or giving the mortgage, and therefore it is vague and uncertain. A conveyance, contract or mortgage founded on a past consideration is valid. Where the mortgage money is due and payable, or no time is mentioned in a mortgage for its payment, a redemption or foreclosure may be decreed at any time; and a mortgage intended to secure a certain

debt is valid in equity for that purpose, whatever form the debt may assume. This deed is declared to be for the security of the debt therein specified, with a covenant to purchase the land and to mortgage it whenever it should be surveyed and offered for sale by the Government. The time of performance of this covenant is not specifically mentioned, but a time is sufficiently stated. The consideration expressed in this deed is sufficient to authorize the Court to enforce a performance of its covenants.

The defendants' counsel argued that this deed is of no validity, as no title to the land was legally vested in the Shumways at the time of its delivery. This deed does not purport to be a mortgage of the fee; but, nevertheless, it may be valid as a mortgage in equity. In equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage. Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action, are capable of being mortgaged. 2 Story's Equity Jur., § 1021. And courts of equity support assignments of, or contracts pledging property, on contingent interests therein, and also things which have no present, actual, potential existence, but rest in mere possibility. Mr. Justice Story in his opinion in *Mitchell* vs. *Winslow*, 2 Story's Rep., 630, remarks: "It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in *esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice." If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title, conveys to the mortgagor or his representative, with a good title, the mortgagee will be entitled in equity to the benefit of it, for it will be considered as a gift into the old stock. *Seabourne* vs. *Parvel*, 2 Vern., 10; *Porter* vs. *Emery*, 1 Cha. Rep., 97; *Hort* vs. *Middlehurst*, 3 Atkyns, 376, *Goodright* vs. *Meade*,

3 Burrows, 1703; *McGinnis* vs. *Noble*, 7 Watts & Serg., 454; *Lessee of Harmer's Heirs* vs. *Morris and Gwynne*, 1 McLean, 44; S. C., 7 Peters, 544.

This deed purports to be a mortgage by the Shumways, of all their property or interest then existing, whatever it might be, with an express covenant to purchase the land of the United States, whenever it shall be surveyed and exposed to sale; and then to mortgage it to these plaintiffs, to secure their indebtedness. By an express written agreement to make a mortgage, a lien is created on the land in equity, on the principle that what has been agreed to be performed, shall be performed. *Hankey* vs. *Vernon*, 2 Cox. 12; 3 Powell on Mort. 1047, a. b. An equitable mortgage springs from an agreement express or implied, that there shall be a lien. The agreement in this case, to purchase the land therein described, and then to mortgage it, is express, and is a specific lien which will be enforced in equity. *Finch* vs. *The Earl of Winchelsea*, 1 *Peer Williams*, 277; *Fremault* vs. *Dedire*, ib. 249; *Deacon* vs. *Smith*, 3 Atkyns, 323; *Tooke* vs. *Hastings*, 2 Vern. 97; *Lyde* vs. *Mynn*, 4 Sim. 505; *Laundell and Wife* vs. *Breary*, ib. 481; *Mitchell* vs. *The Archbishop of York*, 6 Sim. 224; *Burn* vs. *Burn*, 3 Vesey, jr., 581; *Legoide* vs. *Hodges*, 1 id. 477. The same principle seems also to be well established in the Courts of this country. In the matter of Howe and Wife, 1 Paige Rep. 131; *Delaire* vs. *Keenan*, 3 Desauss, 74; *Menude* vs. *Delaire*, 2 id. 564; *Dow* vs. *Ken*, Spears, 413; *Campbell* vs. *Mosely*, 6 Litt. 358; *Fleming* vs. *Harrison*, 2 Bibb. 171; *Richter* vs. *Selin*, 8 S. & R. 425; *Tyson* vs. *Passmore*, 2 Barr. Pa. Rep. 122; *Nicholas* vs. *Longworth*, 1 McLean, 395. I do not deem it necessary to enter upon a minute statement of these authorities, and many others, as I consider the principle to be settled beyond all controversy. This deed is then an equitable mortgage, to be enforced by bill, in equity.

The legal title to this land is in Fitzgerald, subject to the equity of the Shumways, to redeem, on or before the days of payment specified in the bonds of Fitzgerald, to them, for conveyance. On or before the days of payment, as specified in said bond, Fitz-

gerald is obligated to convey to the Shumways, or to their assigns, or to the purchasers, under a decree in this case, upon the payment to him of the amount he advanced for the land, to the government, with interest according to the conditions of the bond. When the land was purchased of the government, the Shumways were in the possession thereof, holding the same against the world, with the tacit or implied assent of the United States; and they so continue until this day. The bonds of Fitzgerald, for deeds are not conveyances of the land, neither are they leases; but they are obligations whereby the Shumways, or their representatives or assigns, may compel, by bills in equity, conveyances of the fee, upon the payment of the purchase money according to their conditions. The purchase of the land by Fitzgerald, at the instance and request of the Shumways, the settlers and improvers in possession, and their acceptance of bonds for conveyances, is the same in equity as if they had made the purchase in their own names, with money borrowed of Fitzgerald, and secured by mortgages of the land.

It is not necessary to determine the question of priority of lien, as the plaintiffs consent to a decree of sale of the two quarter sections entered by Fitzgerald subject to his lien, according to the conditions of his bonds to the Shumways, the premises being considered quite valuable and abundant for the payment of both liens.

A decree of sale according to the prayer of the bill is proper. The plaintiffs might have come into Court with a bill praying specific performance of the contract to mortgage, but such a useless proceeding is not required. The deed under consideration, is an equitable mortgage of the premises, and is considered in this Court, as to these parties, the same as a mortgage executed and delivered in legal form.